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# In the Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-1868**

NATIONAL GEOGRAPHIC SOCIETY,
*Appellant,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
*Appellee.*

On Appeal From the Supreme Court of California

## Motion to Dismiss or Affirm

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On Appeal From the Supreme Court of California

## Motion to Dismiss or Affirm

Appellee Board of Equalization of the State of California, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the instant appeal or to affirm judgment of the Supreme Court of California.

There is no substantial federal question presented as a basis of jurisdiction inasmuch as the questions have been foreclosed by previous decisions of this Court. In this

regard, the decision of the Supreme Court of California correctly applies the principles set forth in the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), *Nat. Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967) and *Standard Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560 (1975). The case of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), which appellant contends is contrary to the opinion of the Supreme Court of California herein, is distinguishable from and not inconsistent with the said opinion.

## QUESTION PRESENTED

Appellant National Geographic Society (hereinafter "the Society") has not fairly stated the question presented herein and has engaged in the wholesale insertion of unnecessary, irrelevant and argumentative detail in the statement of the said question presented to such an extent that it has broken a simple straightforward question into four partial and therefore improper "questions". The question presented is the following: Whether the Society's activities in the State of Calfornia provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by the Society's gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964.

## STATEMENT

The statement of facts set forth in the Jurisdictional Statement is unacceptable to appellee Board of Equalization (hereinafter "the Board") because it states as fact matters outside the record before this Court, omits relevant facts and dwells upon other irrelevant facts.

At page 5 of the Jurisdictional Statement, the Society states as fact the following:



> "The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register."

There is nothing in the record before this Court to show that the Society is not registered to do business in California. Moreover, there is an ample record to *contradict* the further assertion that the Society does not engage in activities within the State of California which would require registration. Thus, as even the Society is forced to admit, it is a stipulated fact that the Society sold certain of its maps, atlases, globes and books over-the-counter in California for a nine month period. Jurisdictional Statement, page 7; Stip. Par. 13; CT 27 (11-17).[1] Under California Law (California Revenue and Taxation Code section 6066[2]) the Society has clearly engaged in business during this time.

The Society further deletes from the statement of facts certain relevant facts which will hereafter be set forth. In addition, the Society sets forth in detail certain facts pertaining to its non profit status which have no bearing upon the resolution of the instant controversy.[3]

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1. References to "stip" embrace the stipulation of facts which is contained in the Clerk's Transcript on Appeal lodged with this Court. For convenience, a copy of this stipulation is attached hereto as "Appendix A". References to "CT" denote the page number of the Clerk's Transcript wherein the referenced matters can be found with the appropriate line number thereafter indicated in parenthesis.

2. At all times relevant hereto, Section 6066 provided in relevant part that "[e]very person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business".

3. The Society's character as a non profit, scientific and educational institution is not relevant to the resolution of the instant controversy. While the Society's character in this regard is de-

## STATEMENT OF FACTS

The Society, a District of Columbia corporation, publishes a monthly magazine known as the National Geographic Magazine (hereinafter "the Magazine"). Stip. Pars. 1 and 4; CT 24(31)-25(2), 25(16-21). The Society also sells maps, atlases, globes and books. Stip. Par. 4; CT 25(19-21).

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Stip. Par. 4; CT 25(13-21). The scientific and educational information it obtains is made available to its members and subscribers through the Magazine, its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports. *Id.*

At all times relevant hereto, the Society maintained two offices in California—one in San Francisco and the other in Beverly Hills. Stip. Par. 12; CT 27(5-9). These offices were originally staffed with one salesman and one secretary each, but both offices have since doubled their personnel.

scribed in paragraphs 1 and 3 of the Stipulation of Facts, these paragraphs were included in the stipulation only at the request of the Society and are subject to the express reservation of the right of either party to argue relevancy set forth in the preamble to the Stipulation of Facts. Stip. p. 1, 11. 28-30; CT 24 (28-30).

In defending this action for refund of the disputed use tax collection liability, the Board is by no means asserting that the Society's objectives are not commendable or worthwhile. The fact remains, however, that the Society's character as a non profit, scientific and educational organization does not entitle it to different tax treatment than would be accorded a private enterprise trying to turn a profit. Stated in another way the Society's character is here irrelevant because this case will stand as a precedent which will govern the Board's treatment of other out-of-state retailers similarly situated. Such other retailers need not possess the non profit character of the Society. On the contrary, they will, in the main, be comprised of profit making retailers eager to escape the requirement of collecting use taxes in order to gain a competitive pricing advantage over local retailers.



Stip. Par. 12 and Footnote 1; CT 27(9-10), 27(27-31). These offices functioned as bases from which the Society solicited advertising for the Magazine; however, during the period from August 1, 1963, through May 6, 1964, the Society also sold certain of its maps, atlases, globes and books over the counter from these offices to Californians. Stip. Par. 13; CT 27(11-14).

The Society's primary method of selling these maps, atlases, globes and books to California residents was through orders placed with its District of Columbia offices. Stip. Par. 10; 26(21-24). The Society advertised offerings of these items in the Magazine and by announcements mailed to all members and subscribers. Stip. Par. 10; CT 26(18-21). Forms or coupons were attached to these advertisements for use in placing orders with the Society. Stip. Par. 10; CT 26(21-24). These orders were mailed to the Society's District of Columbia offices and filled by postal deliveries of the merchandise to the purchaser from the Society's District of Columbia and Maryland offices. Stip. Par. 10; CT 26(21-27). Payment was either on a cash with order basis or a later billing basis. Stip. Par. 10; CT 26(27-29).

Although these advertisements were sent only to subscribers or members, anyone with access to the Magazine could remove the order coupon and purchase these articles from the Society. Stip. Par. 11; CT 27(1-4).

During the period from April 1, 1964, to September 30, 1964, the Society sold maps, atlases, globes and books from its District of Columbia offices to California residents in the aggregate sum of $83,596.48. Stip. Par. 17; CT 28(10-14). The Board assessed a use tax collection liability against the Society measured by these sales and the Society paid this assessment under protest in the sum of $3,838.76.

Stip. Par. 19; CT 28(20-27). The Society thereafter exhausted its administrative remedies and timely commenced this suit for refund of the sum described above as allowed by law. Stip. Par. 21; CT 29(3-5).

## ARGUMENT

The Question Presented Herein, Having Been Resolved by Prior Decisions of this Court, is Neither Substantial Nor Important.

### A. The Decision Below Is In Accord With the Decisions of This Court.

The California Supreme Court held below that the Society's activities in the State of California provided sufficient nexus to support the constitutional imposition of the use tax collection liability imposed upon it by the Board and measured by the Society's gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents. In so holding, the Court predicated its finding of sufficient nexus upon the fact that the Society's maintenance of two employee-staffed offices in this State from which it solicited advertising for the Magazine occasioned it to receive from California protection and benefits for which California could ask return and upon the further fact that these activities were not unrelated to the transaction taxed. It is shown below that this holding is in complete accord with the prior decision of this Court.

The Due Process Clause and the Commerce Clause are closely related insofar as similar standards have been applied by the Courts to determine whether state tax laws are constitutional thereunder. *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756 (1967). These



standards are incorporated into a test of nexus or minimum contact between the taxpayer and the taxing jurisdiction which is necessary to support a finding that the tax is constitutionally imposed. Although the test has been variously stated, the most workable definition of what constitutes nexus is set forth in *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940), wherein the Court noted:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Id.* at 444.

Applying this definition to the facts of this case, it can readily be seen that the Society has secured substantial benefit from its activities within California. By virtue of the protection conferred by this State, the Society has been able to establish and maintain employee staffed offices in San Francisco and Beverly Hills from which to solicit advertising revenues for the Magazine. In this regard it is noteworthy that the Society has since doubled its salesmen and secretaries in both California offices. Further, the very opportunity of having a market of potential advertisers in California from whom to solicit business is a benefit conferred by the state insofar as its laws protects them and permits their continued existence. The net result of these activities is obviously beneficial insofar as it provides the Society with advertising dollars from California businesses.

Certainly the above benefits justify requiring the Society to collect a use tax on its mail order sales to Californians. It is asking the Society no more than to bear a fair share

of the cost of local government. Indeed, in *Standard Steel Co. v. Wash. Revenue Dept., supra,* 419 U.S. 560 (1975), this Court declared that it "verges on the frivolous" to contend that a foreign retailer whose only connection with the taxing state exclusive of U.S. mail and common carrier was a consulting engineer who worked out of his home and discussed anticipated needs of customers had not received anything for which the taxing jurisdiction could ask return by imposing a business and occupation tax upon the retailer measured by the gross receipts of its mail order-common carrier sales. *Id.* at 562.

Having found the Society's activities in California sufficiently substantial to support a finding of nexus under the aforementioned principles, the California Supreme Court went on to conclude that the relational requirements established by this Court in *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941), were also met in the instant case. In that regard, the California Supreme Court held that the Society's sales of maps, atlases, globes and books from its District of Columbia and Maryland offices were not unrelated to its California solicitation of advertising for the Magazine insofar as they both constituted a part of the Society's business in California, both were remarkably similar in nature, function and purpose, and both fulfilled the Society's fundamental purpose of making the information it gathered available to the enhancement of geographic knowledge generally.[4]

4. The Society suggests in the Jurisdictional Statement that the California Supreme Court upheld the validity of the use tax collection liability imposed upon it without regard to whether or not its advertising soliciting activities had any connection whatsoever with the transaction taxed. Jurisdictional Statement at pages 12, 15. This suggestion ignores the Court's holding as described above. The Court clearly found the Society's in-state activities were not dissimilar from its mail order sales and that both were parts of the Society's overall California business and could not be said to be unrelated under the guise of departmentalization. In so holding the Court recognized that under the rule of the *Sears* case these activities must be shown not to be unrelated to the Society's overall course of business within this State.



*Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941), supports the Court's ruling as above described. In that case, this Court upheld the imposition of an Iowa use tax collection liability upon mail order sales which were ordered and shipped by mail or common carrier between the Iowa purchaser and the retailer's out-of-state stores. The Court based its finding of taxable nexus upon the fact that the retailer had stores in Iowa from which it made over-the-counter sales and took orders for shipments of merchandise from out-of-state branches direct to the Iowa purchasers. The retailer argued that the sales made and orders placed through its Iowa retail outlets were separate and distinct from the mail order sales in dispute. In response to this argument, the Court observed:

> "Respondent [the retailer] cannot avoid that burden [the disputed use tax collection liability] though its business is departmentalized. Whatever may be the inspiration of these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." *Id.* at 364.

The rule of the *Sears* case applies in the instant case. Both cases involve the imposition of a use tax collection liability upon mail order sales which may rightly be assumed to be not unrelated to the retailer's other contacts

with the taxing jurisdiction in light of commonly understood facts of business life. In *Sears,* the existence of the retail outlets in Iowa could be said to contribute to some unknown extent to the generation of mail order sales. In the instant case, the Society's advertising offices provide revenus for the Magazine which serves as a vehicle through which the disputed mail order sales are generated and which lends its prestige to the mail order merchandise thereby enhancing their salability.

In addition to its compatibility with the *Sears* decision, the opinion of the California Supreme Court in the instant case is consistent with this Court's holding in *Nat. Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753 (1967). While this Court there held that a use tax collection liability could not be imposed upon an out-of-state retailer whose only contacts with the taxing jurisdiction were through the use of common carriers and the U.S. mail, it scrupulously restricted its decision in that regard to retailers who "do no more than communicate with customers in the State by mail or common carier as a part of general interstate business." *Id.* at 758. It thus suggests that any contacts with the taxing jurisdiction independent of the use of mails and common carriers could support the imposition of a use tax collection liability.

In light of the foregoing, it is respectfully submitted that the decision below is in full accord with the decisions of this Court.[5]

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5. While not a decision of this Court, the decision of *Reader's Digest Association v. Mahin,* 255 N.E.2d 458 (1970), with regard to which this Court denied review in 399 U.S. 919, also supports the decision below. In the *Reader's Digest* case, the Illinois Supreme Court upheld a use tax collection liability imposed by Illinois upon mail order sales of books and phonograph albums made during the fourth quarter of 1967. The retailer, Reader's Digest Association, published a monthly magazine (which was exempt from Illinois use tax) in addition to selling books and phonograph albums. During 1967, the retailer used Illinois advertising media to promote its sales of the books and phonograph albums. The retailer also owned two subsidiaries and held a majority interest in a third corporation all of which had certain contacts with Illinois. One of these subsidiaries, Reader's Digest Sales and Service, Inc., solicited advertising for the magazine although it also had made door-to-door sales of phonograph record players and albums for a time prior to August 1, 1967.

Two grounds were advanced below and reviewed on appeal in support of a finding a taxable nexus: (1) the retailer's local advertising supported a finding of nexus; (2) the activities of the retailer's subsidiaries supported a finding of nexus. The Court considered the first ground and concluded that "certain promotional benefits were derived throughout the year". 255 N.E.2d 458, 460. The Court then considered the second ground but restricted its analysis to the activities of Reader's Digest Sales and Services, Inc. With regard to these activities, it observed:

> "Through its *solicitors* in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i.e., books and albums, sold to Illinois residents. Considering the full benefits flowing to plaintiff's aggregate business from its resident *solicitors* and local advertising, we find without further examination of the other subsidiaries an adequate basis for use-tax liability." 255 N.E.2d 458, 460. (Emphasis added.)

It is clear that the word "solicitors" underscored in the quote was intended to describe the employees of Reader's Digest Sales and Services, Inc., who solicited advertising for the magazine. Therefore, this opinion upholds the imposition of a use tax collection liability on two grounds, one of which was the activities of Reader's Digest Sales and Services, Inc., which for purposes of the Court's analysis were indistinguishable from the Society's activities in the instant case.



### B. The "Dissociation" Test Applicable in Measuring the Validity of Excise Taxes the Incidence of Which Falls Upon Foreign Retailers Is Inapposite to the Resolution of the Instant Controversy

The Society argues in the Jurisdictional Statement that the California Supreme Court improperly refused to apply the "dissociation" test set forth in *American Oil Co. v. Neill,* 380 U.S. 451 (1965) and *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951). In advancing this argument, the Society ignores the fact that the excise taxes before the

Court in those cases fell upon the foreign retailers whereas the use tax collection liability involved in the instant case falls upon the local California purchaser. This difference is crucial insofar as stricter standards of nexus are applied with regard to testing the validity of taxes falling on the foreign retailer.

It is settled under state law that the California use tax collection liability has its incidence upon the California purchasers who store, use or consume the products purchased from foreign retailers. See *Bank of America v. State Bd. of Equal.*, 209 Cal.App.2d 780, 793 (1962); 26 Cal.Rptr. 348. The foreign retailer is liable only for his default in the performance of his duty as collection agent of this tax under California Revenue and Taxation Code section 6203. *Id.* at 799.

The significance of the distinction between a use tax collection liability, the incidence of which is on the local purchaser, and an excise tax imposed directly upon the out-of-state retailer itself was recognized by this Court in *Norton Co. v. Dept. of Revenue, supra,* 340 U.S. 534 (1951), where, in passing upon the constitutionality of a gross receipts tax imposed upon a nonresident retailer, it declared inapposite cases involving the collection of taxes attributable to the local buyer observing that a state imposing use taxes can more easily meet the burden of demonstrating sufficient nexus to support the tax because the impact of those taxes is on the local buyer or user. In that regard, the Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod v. Dilworth Co.,* 322 U.S. 327. Of course, a state imposing a sales[6] or use tax *can more easily meet this burden,* because the impact of those taxes is on the local buyer or user. *Cases involving them are not controlling here, for this tax falls on the vendor.*" (Emphasis added.) 340 U.S. at 537.



This distinction is justified because the local buyer or user has more obvious contracts with the taxing jurisdiction than the nonresident retailer and therefore a tax whose incidence falls upon such buyers or users is more easily sustainable. This is a difference in substance and not merely form. In *McLeod v. Dilworth Co.,* 322 U.S. 327 (1944), the Court noted:

> ". . . we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution, neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it.' *Wagner v. City of Covington,* 251 U.S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331.

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6. The reference to a "sales" tax at this point is explained by the fact that some states have sales taxes the incidence of which falls upon the *consumer* rather than the vendor. See State and Local Taxation, John F. Due (1971), pp. 24-26. Illinois (at the time of the *Norton* decision) had a sales tax the incidence of which was on the vendor and therefore the court was holding inapplicable decisions involving consumer type sales taxes and use tax collection liabilities such as are present in this case.

Perhaps the best illustration of the effect of this distinction is a comparison of the *McLeod* case and *General Trading Co. v. Tax Comm'n,* 322 U.S. 335 (1944). These two cases were argued and decided on the same dates and presented virtually identical facts save and except that *McLeod* involved a sales tax upon an out-of-state retailer and *General Trading Co.* involved a use tax collection liability imposed upon an out-of-state retailer. In both cases the out-of-state corporations were not qualified to do business in the taxing state and had no office or place of business there but did solicit orders from its residents by traveling salesmen. In the *McLeod* case, the sales tax was held unconstitutional; in the *General Trading Co.* case, the use tax collection liability was upheld. The dissents in both cases indicate that the majority reached different results in the two cases solely because of the nature of the tax imposed.

Similarly, *McLeod* also can be contrasted with *Scripto* v. *Carson,* 362 U.S. 207 (1960), where on comparable facts, the court upheld the constitutionality of a use tax collection liability imposed upon the nonresident retailer. The facts of these two cases were recognized as indistinguishable in 81 Harv.L.Rev. 69, 216.

Just as the *Norton* case has been shown to be inapplicable to the instant controversy, so is the case of *American Oil Co. v. Neill, supra,* 380 U.S. 451. In that case, an Idaho State Tax Collector imposed an excise tax on an out-of-state motor fuel dealer. *Id.* at 454, 455. The court expressly adopted the findings of the trial judge that the incidence of the tax was on the dealer not the local user. *Id.* at 456-457.



### C. The Decision of This Court in Miller Bros. v. Maryland, 347 U.S. 340 (1954) Is Inapplicable to the Resolution of the Instant Controversy

The mainstay of the Society's attack upon the decision below is that it is "flatly contrary to the holding of this Court in *Miller Bros. Co. v. Maryland,* 347 U.S. 340 (1954)" Jurisdictional Statement, page 1. As is shown below, the *Miller Bros.* case is not germane to the question here presented because the Court's finding of insufficient nexus in that case turned upon defects not present in the instant case.

In *Miller Bros. v. Maryland,* the court invalidated a Maryland use tax collection liability imposed with regard to the sales of merchandise by a Delaware corporation from its Delaware store to visiting Maryland customers. The merchandise purchased from the Delaware store was either handed to the customer over-the-counter or delivered to the customer's Maryland address by common carrier or the vendor's vehicle. The court in holding the Maryland use tax collection requirement unconstitutional, noted that it was uncertain as to whether merchandise sold over-the-counter was actually transported to Maryland prior to use. 347 U.S. 340, 344.

It is clear from the above that the Court's holding in Miller Bros. turned upon a defect in the relationship between the foreign retailer and the transaction taxed which is not present in the instant case. This defect was aptly described by the court below as follows:

> "The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing *Miller Bros.* in *Scripto v. Carson, supra,* 362 U.S. 207. 212[4 L.Ed.

> 2d 660, 664-665], the Supreme Court declared that it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection to uphold a tax against attack under the due process clause. (*American Oil Co. v. Neill, supra,* 380 U.S. 451, 457 [14L.Ed.2d 1, 6].)" 16 Cal.3d 637, 649-650

In direct contrast, the Society in the instant case shipped all purchases directly to its California customers inside California; hence no uncertainty or gaps intervene between the Society's activities and the taxable transaction.

In addition to the foregoing, *Miller Bros.* may be distinguished from the instant case insofar as the foreign retailer in that case did not directly exploit the market of the taxing State. Thus, the Court in *Miller Bros.* emphasized that the Delaware based foreign retailer did not engage in solicitation in Maryland, the taxing jurisdiction, "other than the incidental effects of general advertising" in Delaware and that there had been "no invasion or exploitation of the consumer market in Maryland", thereby recognizing the *incidental* nature of the solicitation of the Marylanders there involved. 347 U.S. 340, 347. Stated in another way, the Delaware store did not direct an advertising campaign specifically against the residents of Maryland; rather, its general advertising directed to potential customers in the vicinity of the store spilled over into Maryland as well as reaching residents of Delaware. Further, the purchasers did not deal with the store from their residences but had to leave Maryland and visit the store in Delaware. This situation prompted the United States Supreme Court in *Scripto*



*v. Carson, supra,* 362 U.S. 207 (1960), to characterize the facts of *Miller Bros.* as follows:

> "True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but *Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales.*" (Emphasis added.) 362 U.S. 207, 212.

All of the above described factors which led the court in *Miller Bros.* to find that there had been no exploitation of the Maryland market are absent in the instant case. The Society specifically directed its advertising campaign for the sales of maps, atlases, globes and books against its California subscribers. This solicitation was continuous in the form of repeated advertisements in the Magazine and mailed announcements sent throughout all periods relevant hereto. Finally, the Society did not wait for these California residents to come to its out-of-state stores, but enclosed with the advertisements mail order coupons which were completed and sent directly to respondent. It is clear that under the rationale of the *Miller Bros.* case the Society has exploited the California market.

For all the foregoing reasons, the *Miller Bros.* case is inapposite.[7]

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7. The case of *Montgomery Ward & Co. v. Bd. of Equalization,* 272 Cal.App.2d 728 (1969), cert. den. 396 U.S. 1040, cited by Society can be distinguished on the same grounds as *Miller Bros.* insofar as it involved a California use tax collection liability imposed with regard to over-the-counter sales of goods by an out-of-state retailer from its Reno, Nevada and Klamath Falls, Oregon stores to customers with California addresses. As the California Supreme Court below noted, the constitutional defect in the *Montgomery Ward* case "lay in the lack of certainty between the seller's activities and the event to be taxed, namely the use". 16 Cal.3d 637, 649.

**D. The Remaining Contentions of Appellant Are Without Merit**

Although it has been shown in the preceding sections of this brief that the Society's basic contentions are without merit, certain points raised by the Society in its Jurisdictional Statement have not previously been touched upon and will be dealt with below.

The Society argues that the instant case is distinguishable from all prior decisions of this Court which held sufficient nexus existed to warrant the imposition of a use tax collection liability upon a foreign retailer because the "indispensible element" of a local sales activity is missing herein. Jurisdictional Statement, page 14. This conclusion is totally at variance with the rationale underlying the decisions of this Court. As noted earlier, the question of whether sufficient nexus exists turns upon the question of whether the taxing State has given anything for which it can ask return. *Wisconsin v. J. C. Penney Co., supra,* 311 U.S. 435, 444 (1940). Obviously, a foreign retailer can enjoy the benefit of the protection of the local government of the taxing jurisdiction in the conduct of activities other than sales activities. It would contradict the logic of the fairness concept underlying the nexus requirements above described to say that, while sales related local activities would be recognized as drawing upon the protection of local government, all other activities would not. Yet that is what the Society is asking this Court to do. It is submitted that it would be folly to entertain the fiction that the Society, which has two employee staffed offices in California, does not enjoy benefits for which a return can be asked.

In addition to the logical inconsistency of the Society's position, it is evident that such a limitation upon the character of a foreign retailer's local activities supporting a finding of nexus would conflict with the decisions of this Court. Thus, in *National Bellas Hess v. Department of*



*Revenue, supra,* 386 U.S. 753 (1967), in holding that a use tax collection liability could not be imposed upon an out-of-state mail order retailer whose only contacts with the taxing jurisdiction were through the use of common carriers or the U.S. mail, this Court noted that to conclude otherwise would be to:

> "... repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or *property within a State,* and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." (Emphasis added.) 386 U.S. 753, 758.

It is evident from the above that the Court recognized that a mail order seller with property within a state would subject itself to taxation upon its mail order sales to the residents of that state even though ownership of property does not equate to the sales activities which the Society suggests constitute an "indispensable element" of nexus.

The Society attemps to distinguish the holding of this Court in *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941) upon the ground that the foreign retailer in that case was qualified to do business within the taxing jurisdiction. Jurisdictional Statement, page 18. In that regard, as noted earlier, the Society has gone outside the record before this Court to suggest that it was not similarly qualified to do business in California. This suggestion conflicts with the record insofar it is stipulated that the Society did sell tangible personal property in California during the first nine months of the period in controversy and therefore, pursuant to the presumption that things are

8. *McFarland v. Campbell,* 213 F.2d 855, 858 (1954).

lawfully done,[8] it must be presumed that the Society complied with California Revenue and Taxation Code Section 6066 and secured a seller's permit. Moreover, even if it were assumed that the Society did not seek a seller's permit, it should nevertheless be estopped to deny the lack of having qualified to do business in California in light of its stipulated admission that it did in fact do business in this state.

Furthermore, the result reached in *Sears* would not have been otherwise if the retailer in that case had not been registered to do business within that state. Although the Court there speculated hypothetically that the lack of qualification to do business within the taxing jurisdiction might result in an inability to tax occasioned by the impotence of state power, it went on to find that the taxpayer's local activities in the taxing jurisdiction were "not unrelated" to its mail order business. 312 U.S. 359, 364. Thus the court recognized that the presence or absence of qualification to do business within the taxing jurisdiction was superfluous to the conclusion it reached on the facts before it. Moreover, this Court has easily found sufficient nexus to support the imposition of a use tax collection liability against foreign corporations in other cases before it despite the fact that the corporation was not licensed to do business in the taxing state. *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62 (1939); *General Trading Co. v. Tax Comm'n.,* 322 U.S. 335 (1944). It follows that the Society's arguments in this regard should be dismissed as irrelevant.

The Society alludes to the fact that the Magazine is exempt from tax. Jurisdictional Statement, pages 15, 18. This exemption is conferred as a matter of legislative grace under California Revenue and Taxation Code 6362 which exempts the gross receipts from the sale or use of periodicals and their components from sales and use taxation and



is not germane to the resolution of the instant controversy.[9] Nevertheless, the Society makes reference to this statute thereby suggesting that it somehow compels this Court to disregard its California advertising soliciting activities in passing upon the question of whether sufficient nexus exists to support the disputed use tax collection liability. This suggestion is spurious.

In the first place, the periodical exemption contained in section 6362 does not relate to the Society's California advertising soliciting activities. The statute only addresses itself to the taxability of gross receipts from the sale or use of *tangible personal property.* This is eminently logical because sales and use taxes are only imposed with regard to the gross receipts from the sale of tangible personal property or the sales price of tangible personal property stored, used or otherwise consumed in California. California Revenue and Taxation Code Sections 6051, 6201. Thus, unless there is a sale or use of *tangible personal property,* the event is nontaxable under the Sales and Use Tax Law. Section 6362, which confers an exemption from sales and use taxes, must therefore necessarily refer exclusively to gross receipts from transactions in *tangible personal property.* To hold otherwise would be to construe this statute as exempting from sales and use taxation transactions which are not subject to sales and use tax in the first place. In contrast, the Society's solicitation of advertising and subsequent sale of advertising space is a *service* as opposed

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9. California Revenue and Taxation Code Section 6362 provides in relevant part as follows:

"(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical."

to a transaction in tangible personal property. Therefore, section 6362 does not apply.

In the second place, even if the Society's California advertising soliciting activities were declared by some hypothetical statute to be exempt from state taxation, this would be irrelevant to the instant controversy. Such a statute would not affect the determination of whether the Society had received any benefits from its California advertising activities for which California can ask a return under federal constitutional standards of nexus. The California Supreme Court noted this when it observed:

> "The existence of a nexus to tax an interstate transaction is a constitutional question. The only relevant considerations are the contacts between the taxing state and the person and event to be taxed. The fact that a state chooses not to tax when it could constitutionally do so does not in any way reduce these contacts with the state. The manner in which the state chooses to exercise the power does not affect the existence of the power." 16 Cal.3d 637, 645.

This point was also made in *Reader's Digest Association v. Mahin, supra,* 255 N.E.2d 458 (1970), cert. den. 399 U.S. 919. *Reader's Digest* involved many facts similar to the instant case. One such fact was that Reader's Digest Association published a monthly magazine exempt from taxation under the Illinois equivalent to California's periodical exemption. Despite this exemption, the court held that the presence of Reader's Digest Association's advertising solicitors within Illinois could be considered as one basis for finding sufficient nexus to uphold the taxation of its mail order sales of books and albums to Illinois residents in the face of constitutional objections. Thus, the court said:



> "Through its solicitors in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i.e., books and albums, sold to Illinois residents." 255 N.E.2d 458, 460.

In light of the above, it is clear that section 6362 is irrelevant to the resolution of the instant controversy.

The Society, as a final point, attacks the California Supreme Court opinion below as having improperly regarded the substantiality of the Society's California business as a "determining factor" with regard to the validity of the disputed use tax collection liability contrary to the holding of this Court in *Nat. Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753 (1967). Jurisdictional Statement, pages 23-25. This point is without merit. The California Supreme Court's reference to the substantiality of the Society's business in this state was merely intended to demonstrate that it could not be dismissed as *de minimis.* This distinction is of critical significance. It has been implicitly recognized in the decisions of this Court that exploitation of the local market of the taxing jurisdiction is a fundamental attribute of nexus. E.g., *Miller Bros. v. Maryland, supra,* 347 U.S. 340, 347 (1954); *Scripto v. Carson, supra,* 362 U.S. 207, 212 (1960). Therefore, had the volume of the Society's California business been inconsequential, a finding of sufficient nexus to support the imposition of the disputed use tax liability would be inappropriate. Clearly, the Court's holding in this regard does not run counter to the *Nat. Bellas Hess* decision or any other decision of this Court.

## CONCLUSION

Wherefore, the Board respectfully submits that the issue here involved is so unsubstantial as not to need further argument, and it respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the case by the California Supreme Court.

DATED: August 17, 1976.

Respectfully submitted,

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Attorneys for Appellee,
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**(Appendices follow)**

# APPENDIX

***Appendix A***

FILED
SEP 14 1973
MARTIN MONGAN, CLERK
By Gerald Gallagher, Deputy

*Superior Court of the State of California*
*For the City and County of San Francisco*

No. 577928

NATIONAL GEOGRAPHIC SOCIETY,
*Plaintiff,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
*Defendant.*

*STIPULATION OF FACTS*

IT IS HEREBY STIPULATED by and between the parties hereto by their respective counsel that for the purpose of trial of the above entitled case the facts hereinafter stipulated are true and correct and may be treated by this court as facts proven in open court.

This stipulation shall be the sole and exclusive evidence before the court in the trial of this matter; however, the parties reserve the right to amend this stipulation of facts by further and additional stipulations.

It is agreed, however, that this stipulation shall not be construed as a concession by either party of the relevancy or materiality of any of the facts stipulated herein and the parties hereto expressly reserve the right to argue the relevancy or materiality of any of the facts stipulated herein to be true.

1. National Geographic Society (hereinafter "the Society") is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N. W., Washington, D. C.

2. The State Board of Equalization (hereinafter "the Board") is the agency of the State of California empowered and required to assess and collect liabilities arising under the Sales and Use Tax Law of California.

3. The Society is exempted as an organization from the payment of federal income taxes under Internal Revenue Code section 501(c)(3) as amended.

4. The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890 the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly National Geographic Magazine (hereinafter "the Magazine"), its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports.

5. The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent (5%) of total circulation.

6. Membership in the Society is open to all persons. The majority of such members joined the Society because they desired to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington area. Members presently pay $7.50 a year for membership in exchange for which they receive one year's subscription to the Magazine.



Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indexes); however, they do have the opportunity to purchase items published by the Society from its offices in Washington, D. C.

7. Non-member subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to in paragraph 5 above) must pay $9.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

8. As of June, 1972, there were approximately 872,000 member subscriptions and 21,000 non-member subscriptions to the Magazine in California.

9. The National Geographic Magazine is exempted from the California Sales and Use Tax as a "Periodical" under California Sales and Use Tax Law § 6362.

10. The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D. C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D. C. offices.

11. Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

12. Since 1956 the Society has maintained two offices in California. One such office has been on the 10th floor of the 31 story Russ Building in San Francisco. Until 1965 the other was on the second floor of a two-story building at 8693 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and secretary.[1]

13. During the period from August 1, 1963 through May 6, 1964, maps, atlases, globes and books of the type described in paragraph 9 were sold to individuals over the counter from the San Francisco and Los Angeles offices of the Society totalling a sales' value as follows:

| San Francisco | Los Angeles |
|---|---|
| $679.20 | $2,161.85 |

14. In comparison with local sales as tabulated in the foregoing schedule, the shipment of maps, atlases, globes and books exclusive of the Magazine to California Society members and residents from orders received at the Washington, D. C. office during the same period totalled a sales' value of $452,470.00.

15. With regard to the sales of maps, atlases, globes and books from the San Francisco and Los Angeles offices of the Society as described in paragraph 13 above, the offices did not verify whether or not a prospective purchaser was a member of the Society and sales could have been made to individuals who were neither members nor subscribers.

16. The Society paid to the Board state and local *sales* taxes plus appropriate penalties and interest upon sales

1. In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970.



totaling $546.20 described in paragraph 13 above during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

17. At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising for the Magazine.

18. During the period from April 1, 1964 to September 30, 1964 the Society made sales of maps, atlases, globes and books to California residents from its Washington, D. C. offices in the manner described in paragraph 10 above in the sum of $83,596.48.

19. Based upon the sales described in paragraph 18 above, the Society paid under protest a use tax collection liability as follows:

| Period | State and Local Use Tax Measure of Tax | Collection Liability With Interest and Penalties |
|---|---|---|
| 4/1/64-6/30/64 | $45,156.36 | $2,085.90 |
| 7/1/64-9/30/64 | 38,440.12 | 1,752.86 |
| | $83,596.48 | $3,838.76 |

20. Two typical issues of the Magazine are attached hereto. These issues exemplify the Magazine during the period in question and today. The offerings of maps, atlases, globes and books in these issues and the order forms which constitute a part of such offerings are typical of the advertised offerings described in paragraph 10 above.

21. The Society has exhausted its administrative remedies and has timely brought this action for refund of the payments described in paragraph 19 above.

22. It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that this action may be brought to trial at any time prior to

August 1, 1974 and that the Board hereby waives the provisions of Code of Civil Procedure section 583 up to and including July 31, 1974.

DATED: September 14, 1973.

For the
NATIONAL GEOGRAPHIC SOCIETY

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## *Appendix B*

California Statutes in effect during period in controversy. (Not set forth in Appendix C in Jurisdictional Statement.)

*California Revenue and Taxation Code Section 6051:*

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

*California Revenue and Taxation Code Section 6066:*

Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business. Every application for a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.